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No. 08-636 (2)

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IN THE

Supreme Court of the United States

GENERAL AUTO SERVICE STATION, an Illinois Corporation, F.A.Y. PROPERTIES, INC., an Illinois Corporation, and COSMOPOLITAN BANK AND TRUST, Successor to the Cosmopolitan National Bank of Chicago, Not Individually but as Trustee under Trust Agreement dated December 21, 1994 and Known as Trust #27340,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant
Corporation Counsel
KERRIE MALONEY LAYTIN *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0764

* Counsel of Record

Attorneys for Respondent City of Chicago

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether petitioners lack standing.

2. Whether petitioners' claim is time barred.

3. Whether this Court should decline to review a non-existent conflict between decisions of the Seventh and Ninth Circuits, where petitioners did not present to the courts below the issue they now assert, and petitioners misrepresent what was decided in both cases.

4. Whether this Court should decline to review a non-existent conflict between decisions of the Seventh and First Circuits, where petitioners did not present to the courts below the issue they now assert, and the different outcomes reflect the different facts of the cases.

5. Whether this Court should decline to review a non-existent conflict in the "approach" used by two Courts of Appeals examining different ordinances of different municipalities when there is no difference in "approach"; even if there were, rectifying a difference in "approach" has no nationwide significance; and the different outcomes reflect the different facts of the cases.

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BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

STATEMENT

The sign at issue in this case was erected without a permit in 1962 on the side of petitioners' building in Chicago. Pet. App. 2a-3a.[1] The sign was used for ad-

[1] For simplicity, we will use "petitioners" to refer to all petitioners, without differentiating among them for purposes of actions taken by any or all of them or by petitioners' former

vertising from the date it was erected until 2008, when petitioners finally removed it after losing below. Pet. 4-5; Pet. App. 3a. The district court interpreted the City's Municipal Code in force at the time the sign went up to require a permit only for the erection of illuminated signs, and the City and the Seventh Circuit accepted that reading for purposes of the appeal. Pet. App. 3a. The district court also interpreted the Code from that time period to authorize advertising signs that, like this one, were located within 75 feet of a residence district, provided they were not also within 75 feet of improved property in that district. *Id.* at 3a-4a. The City and the Seventh Circuit likewise accepted that reading for purposes of the appeal. *Id.* at 4a. The courts and the parties therefore proceeded below on the assumption that the sign was lawful when it was first erected. *Ibid.*

As both lower courts and even petitioners agree, petitioners later made two changes to the sign that required a permit, and there is no evidence that petitioners ever applied for or obtained one. Pet. 5; Pet. App. 4a-5a, 104a. First, between 1962 and 1969, petitioners installed lights on the sign. Pet. App. 4a. Second, between 1975 and 1979, petitioners combined two smaller signs into a larger sign and, in 1979, enlarged the sign to 26 feet by 59 feet, the size it remained until it was removed. *Ibid.*

In 1986, the City issued a violation notice asserting that petitioners' sign had been installed without a permit in violation of the Code. Pet. App. 5a. After scheduling and continuing a compliance hearing on

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owners or agents. The distinctions among these parties are not relevant to the issues presented here.

several occasions, the City took no further action on the notice. *Ibid.*

In 1990, the City revised the Code to prohibit all advertising signs within 75 feet of a residence district and advertising signs larger than 100 square feet within 250 feet of a residence district. Pet. App. 5a, 118a. Petitioners' sign did not conform to the amended ordinance. Pet. 10; Pet. App. 5a-6a. The City also enacted a "grandfather provision," allowing signs that did not comply with this change, among others, to remain if they had been "lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section." Pet. App. 5a, 120a.[2]

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[2] As petitioners note, the Seventh Circuit mistakenly believed that the current version of the grandfather provision no longer contains the requirement that the sign already have a permit. Pet. 15 n.6; see also Pet. App. 33a n.3. Although this requirement was deleted from a revision of the ordinance enacted on November 1, 2004, it was reinstated two days later. Pet. 15 n.6; Pet. App. 121a. What petitioners fail to bring to this Court's attention is the reason the Seventh Circuit "overlooked" (Pet. 15 n.6) the November 3 reinstatement–petitioners' affirmative representation that the November 1 ordinance deleting the requirement was the version in effect. Petitioners asserted that the City had taken "the affirmative step of 'correcting' this provision" by deleting the permit requirement and that the grandfather provision was applicable if a sign was "lawfully established," with or without a permit. Amended Brief and Short Appendix of Appellants, Nos. 05-2515 & 06-2672 (cons.), at 27-28 (7th Cir.) ("Petrs. CA Br."). Petitioners made these representations even though the City had brought the November 3 amendment to their attention in the district court (R. 115 ¶ 3); they addressed it there (R. 119 at 2-8); and they included the November 3 version in their appendix (Appellants' Appendix of Additional Contents Pursuant to Seventh Circuit Rule 30(b), Nos. 05-2515 & 06-2672 (cons.), at 228 (7th Cir.) ("CA Rule 30(b) App.")). What the court below actually "overlooked" was the footnote in the City's brief explaining all of

In September 1994, the City issued another violation notice, this time charging that petitioners' sign violated the 1990 distance requirement. Pet. App. 5a-6a. In response, petitioners applied for a permit, and the City's zoning department determined (mistakenly, in the City's current view) that the sign was a legal, nonconforming use. Pet. 11; Pet. App. 6a. Petitioners never obtained a necessary City Council order approving the sign, and no permit issued. Pet. App. 6a. The City took no further action on the 1994 violation notice. Pet. 12; Pet. App. 6a.

In August 1997, the City issued a third violation notice directing petitioners to obtain a permit "for outdoor flat building sign installed without permit." Pet. App. 6a (internal quotation marks omitted). In September 1997, petitioners appeared before the City's Department of Administrative Hearings and admitted noncompliance with the permit requirement. *Id.* at 7a. The City entered a finding that the sign was in violation of the Code. *Ibid.*; CA Rule 30(b) App. at 117. Petitioners were given an opportunity to comply, and thereafter filed a permit application. Pet. App. 7a. This time, the City's zoning department denied zoning certification for the sign because it violated the 1990 distance requirement and could not be grandfathered because it lacked a prior permit. *Ibid.* Petitioners pursued the denial of

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this. Brief and Appendix of Defendant-Appellee City of Chicago, Nos. 05-1515 & 06-2672 (cons.) at 39 n.15 (7th Cir.) ("City CA Br."). Of course, it was convenient at that time for petitioners to misrepresent the scrivener's error as a "correction" so they could argue, to further their substantive due process claims, that the prior permit requirement was arbitrary and irrational, even in the City's view. Petrs. CA Br. at 26-28. Petitioners present the correct version now that they understand their version puts them at risk of mootness (which we do not argue).

zoning certification all the way to the Illinois Supreme Court, but it was not overturned. *Id.* at 7a-8a. In the meantime, the City fined petitioners and ordered the sign's removal. *Id.* at 7a.

Petitioners filed this suit on January 19, 2000. R. 1-1. Their complaint included First Amendment and due process claims (both procedural and substantive), among others. Pet. App. 9a. Under the First Amendment, petitioners challenged the City's application of the permit requirement and the distance requirement to prohibit the sign, claiming that "the commercial speech contained in the . . . Sign concerns a lawful activity that is not misleading, and which the City has no[ ] legitimate or substantial interest in restricting or prohibiting." R. 61 at 11.

The City moved to dismiss. R. 68. In response, petitioners described their First Amendment claim as an "as applied" challenge to the City's "arbitrary and irrational" application of the Code's provisions that permitted nonconforming advertising signs to remain if they were legally erected pursuant to a permit but not if they were "legally erected or painted without a permit simply because no permit was required by the Code, as in the instant case." R. 77 at 7. According to petitioners, the City "has no legitimate interest under the First Amendment in making such an irrational and arbitrary distinction among non-conforming advertising signs." *Ibid.* They urged analysis under the scrutiny applicable to content-based, rather than content-neutral, regulations because the provisions had been applied to an advertising sign containing commercial speech. *Id.* at 7-9. The district court dismissed this claim (and all but the two substantive due process claims). Pet. App. 76a-101a. The court understood petitioners' First Amendment

claim to challenge the Code "as applied to their sign because it allows advertising signs to remain as legal, nonconforming signs if they predated the 1990 amendments and were erected pursuant to a valid permit, but not if the signs predated the 1990 amendments and were erected without a permit, even if no permit was required at the time." *Id.* at 81a-82a. The court rejected petitioners' argument that the challenged provisions were content based, recognizing that the grandfather provision applies to all signs, not just adverting signs, and it, rather than the underlying regulation of commercial speech, prevented petitioners' sign. *Id.* at 84a. Additionally, petitioners' First Amendment challenge did not state a claim because it was "nothing more than a restatement of [their] arguments that the City's refusal to grandfather [their] sign deprives [them] of due process." *Id.* at 84a-85a (internal quotation marks omitted).

The case proceeded to a bench trial on the substantive due process counts. Pet. App. 12a. In petitioners' post-trial brief, as part of their argument that they had a vested property interest in the sign for purposes of these claims, they asserted that, despite their failure to obtain a permit when the sign was illuminated and enlarged in the 1960s and 1970s, the sign remained a legal use because the permit requirement from that time violated the First Amendment as an illegal prior restraint. R. 114 at 27-29. The district court first refused to consider the argument because, in its view, petitioners had not explained how the permit requirement "constitute[d] a regulation of commercial speech sufficient to implicate the First Amendment." Pet. App. 71a. The court also recognized petitioners' argument as merely restating petitioners' procedural due process claim,

which was time barred. *Ibid.* Ultimately, the court did not address the merits of the claim that the permitting scheme was an invalid prior restraint–with unbridled discretion and no adequate time limits–because petitioners "did not qualify for a permit under the relevant zoning laws and, thus, the delay or discretion in issuing such a permit could not have violated [their] rights." *Ibid.* The court entered judgment for the City on the substantive due process claims, in part because petitioners' sign became illegal when it was illuminated and enlarged without a permit. *Id.* at 71a, 73a.

Petitioners repeated their prior restraint argument in a motion to modify the judgment. R. 128 at 5-10. In its decision, the court again stated that the permit requirement did not "implicate[ ] First Amendment concerns" (Pet. App. 42a) because the ordinance did not pose a sufficient threat of censorship to give rise to a facial challenge (*id.* at 41a-45a). A facial challenge was impermissible because "[a] permit requirement that applies only to illuminated signs without distinguishing between commercial and noncommercial speech is too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 45a (internal quotation marks omitted). The court did not address the constitutionality of the permit requirement on the merits.

Petitioners' appellants' brief below described their First Amendment claim as a challenge to allowing grandfather status for nonconforming advertising signs lawfully erected pursuant to a permit, but not for nonconforming advertising signs, such as its sign, "where the advertising sign was lawfully erected, but where there had been no prior requirement to obtain

a sign permit for its lawful erection." Petrs. CA Br. at 44-45. Petitioners claimed it was arbitrary to require a permit for the sign to remain, when none was needed when erected. *Id.* at 45. Petitioners asserted that the distance requirement that rendered their sign nonconforming and the grandfather provision that denied legal nonconforming status to the sign were, together, content-based regulations subject to heightened scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than the diminished scrutiny for content-neutral regulations. Petrs. CA Br. at 45-46. Their brief canvassed *Central Hudson*'s four-part test (*id.* at 46-48), claiming the ordinances failed parts three and four because "the City has no legitimate interest under the First Amendment in making an irrational and arbitrary distinction among nonconforming advertising signs" and there is no "'reasonable fit' between the . . . restriction against some, but not all, legally erected advertising signs" (*id.* at 47). Petitioners made no argument that the regulations violated the First Amendment even if content neutral.

Petitioners' substantive due process argument asserted that the City's permit requirement in effect in the 1960s and 1970s when the sign was illuminated and enlarged was an unconstitutional prior restraint. Petrs. CA Br. at 35-41. This argument aimed at the district court's conclusion that their failure to obtain a permit for the illumination and enlargement of the sign caused it "to become an illegal use, and therefore unqualified for legal nonconforming status" and also "to show a 'separate constitutional violation,' as may be required [in the Seventh Circuit] to prove denial of . . . substantive due process rights." *Id.* at 41. Petitioners contended that the former permitting scheme was not content neutral, but also argued that it was

unconstitutional even if it were. *Id.* at 37, 40-41. Because petitioners challenged the prior version of the permit requirement only in the context of substantive due process, the Court of Appeals considered it "only within the context of whether a due process property right had been established." Pet. 16.

In reply on the First Amendment claim, petitioners again asserted that the distance requirement and the grandfather provision, in combination, were content-based regulations subject to heightened scrutiny. Appellants' Reply Brief, Nos. 05-2515 & 06-2672 (cons.), at 19 (7th Cir.) ("CA Reply Br."). They also claimed, for the first time, that there was no fit between the regulations' restrictions and their purpose because the provisions distinguished between advertising signs erected pursuant to a permit "and other advertising signs not erected pursuant to a permit (and not allowed to remain) because they were not established with a permit obtained under an unconstitutional sign-permitting scheme." *Id.* at 20 (emphasis omitted). The Seventh Circuit did not appear to notice this shift, but the argument made for the first time in reply was waived under Circuit precedent.

The Court of Appeals affirmed the dismissal of petitioners' First Amendment claim, holding that petitioners had not stated a claim for the regulation of commercial speech:

> True enough, section 8.9(7) of the zoning ordinance [the distance requirement] is a regulation of commercial speech, in that it specifically bans advertising signs larger than 100 square feet from being located within 250 feet of a residence district. But [petitioners] do[ ] not contend that the constitutionality of section 8.9(7) itself is

> suspect. . . . [Their] attack, as the district court recognized and as [their] appellate brief makes plain, is on the grandfather provision of section 6.7-1(a), and the differing treatment that provision grants to previously permitted signs as distinct from signs that were [erected] without a permit. Yet, the grandfather provision is not a provision that is triggered by the commercial content of the sign in question. As [petitioners] concede[ ], section 6.7-1(a) applies to all manner of signs, not just advertising signs. As such, we agree with the City that the grandfather provision is a content-neutral time, place, and manner restriction on speech rather than a regulation of commercial speech.

Pet. App. at 31a-32a. Because petitioners had not challenged the grandfather provision under the scrutiny applicable to content-neutral regulations, that argument was waived. *Id.* at 32a. In this Court, petitioners suggest that they did not waive the argument (Pet. 19-21)–pointing to their argument that "'even if [the court] were to find the City's [former] sign permitting scheme to be a content-neutral time, place and manner restriction, it still would not pass constitutional muster . . . .'" *Id.* at 19-20 (quoting brief). But that quotation is from their argument on their substantive due process claims (Petrs. CA Br. at 40-41), and petitioners nowhere argued that the distance requirement and the grandfather provision they challenged under the First Amendment were unconstitutional even as content-neutral regulations.

The Court of Appeals also affirmed judgment for the City on petitioners' due process claims. Pet. App. 29a. On the substantive due process claims, the court held that because petitioners had not obtained

the necessary permits when they illuminated and enlarged the sign in the 1960s and 1970s, they did not have a property interest in the sign under state law as required to challenge the refusal to grandfather the sign as a denial of substantive due process. *Id.* at 20a, 26a-29a. In reaching this conclusion, the court assumed, but did not decide, that the permit requirement from that time was unconstitutional and that petitioners were entitled to ignore it. *Id.* at 20a-22a. But the court concluded that being entitled to ignore an unconstitutional requirement did not confer a protected property interest (*id.* at 22a-27a): "[T]he supposed illegality of former incarnations of the zoning ordinance [did not] transform [petitioners'] unlicensed use of property into an authorized use and . . . give [them] a property interest in continued use of that property." *Id.* at 27a.

In their petition for rehearing, petitioners disputed the panel's determination on their First Amendment claim that the challenged provisions were content neutral. Appellants' Petition for Rehearing With Suggestion for Rehearing En Banc, Nos. 05-2515 & 06-2672 (cons.), at 17-18 (7th Cir.). According to petitioners, "[t]he panel's refusal to acknowledge that the sign regulation at issue is content-based is also in direct conflict with [*Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996)]." *Id.* at 18. They also revived the new spin on their First Amendment claim from their reply brief, describing the claim as a challenge to grandfathering advertising signs based on whether "the advertising sign had been erected (meaning also 'illuminated' or 'enlarged') pursuant to a permit under the then-existing unconstitutional permitting scheme." *Id.* at 16. According to petitioners, this "invoke[d]

content and viewpoint censorship." *Ibid.* The Seventh Circuit denied rehearing. Pet. App. 102a.

REASONS FOR DENYING THE PETITION

The reasons that this Court should decline review are numerous. Most important, petitioners lack standing. In addition, their suit is time barred, which should preclude this Court's review of all three issues. Each issue also suffers from a litany of flaws. None of the three presents an important conflict worthy of this Court's attention, especially once petitioners' misrepresentations are swept aside. The first two would require this Court to decide a constitutional issue in the first instance. And the decision below was correct in any event.

1. Petitioners lack standing to bring suit. Article III standing requires an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. See, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is a prerequisite to this Court's subject matter jurisdiction, and the issue is not subject to waiver. See, *e.g.*, *United States v. Hays*, 515 U.S. 737, 742 (1995).

Here, petitioners' sign was illegal from its inception because it violated the Code's prohibition on advertising signs "within 75 feet of any property in a Residence District." Pet. App. 118a. Although the City chose not to dispute the district court's unfavorable interpretation of this provision for purposes of the appeal (see *id.* at 3a-4a), the parties joined issue on the question in the district court (see *id.* at 66a-68a). There, petitioners conceded that their sign was within 75 feet of a residence district when erected (see *id.* at 53a), but claimed that because it was not within 75 feet of any residential building, it did not

violate the provision (see *id.* at 66a). But the plain language of the ordinance compels a contrary conclusion. The dictionary defines "property" broadly enough to include any piece of real estate (see *id.* at 67a-68a), and "any property in a Residence District" therefore must refer to both improved and unimproved property. If the ordinance's intent had been to ban only signs within 75 feet of actual buildings, its language would have said that. This conclusion is supported by the trial testimony of the City's then-Acting Zoning Administrator. See *id.* at 67a.

Because the sign was unlawful when it was erected, the City could lawfully order the sign removed because it was too close to a residence district. And this reason remains true even if the City could not constitutionally prohibit or refuse to grandfather the sign based on petitioners' failure to comply with the permit requirement. Petitioners never challenged the constitutionality of the distance requirement itself, nor the constitutionality of the 1990 amendments to that provision (see Pet. App. 31a), which they concede rendered their sign nonconforming (see Pet. 9-10). They consequently lack standing because their claimed injuries cannot be redressed by a favorable decision. The Courts of Appeals are generally in agreement that plaintiffs lack standing to challenge sign ordinances where their signs are illegal under unchallenged provisions. See, *e.g.*, *Maverick Media Group, Inc. v. Hillsborough County*, 528 F.3d 817, 820-21 (11th Cir. 2008); *Midwest Media Property, L.L.C. v. Symmes Township*, 503 F.3d 456, 461-62 (6th Cir. 2007); *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421, 430 (4th Cir. 2007); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Harp Advertising Illinois, Inc. v. Village of Chicago*

Ridge, 9 F.3d 1290, 1291-93 (7th Cir. 1993); *cf. Renne v. Geary*, 501 U.S. 312, 319 (1991) (doubting redressability where unchallenged statute could be construed to prohibit same conduct as challenged statute). This Court should accordingly decline review.

2. Petitioners' suit is also time barred. The City raised a limitations defense in our motions to dismiss (see R. 12, 28, 68), and at trial (see R. 113), and revived the argument in our brief below with respect to all claims (see City CA Br. at 18-29, 46, 49-50 & n.19). The district court found petitioners' due process claims time barred. See Pet. App. 38a-41a, 62a-64a, 86a-92a. The Seventh Circuit expressly put aside the limitations defense in considering petitioners' substantive due process claims (see *id.* at 17a-19a), and did not mention the defense in ruling on petitioners' other claims. As prevailing party below, the City is entitled to defend the judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

The relevant statute of limitations in a section 1983 action is the personal injury statute of limitations of the state where the injury occurred. See, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Illinois, that statute of limitations is two years. See, *e.g.*, *ibid.* The limitations period begins to run when "the plaintiff has 'a complete and present cause of action.'" *Id.* at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 201 (1997)) (further internal quotation marks omitted). In this case, the City issued a violation notice to petitioners in August

1997 charging that the sign lacked a permit. See Pet. App. 6a. In September 1997, petitioners appeared at an administrative hearing and admitted that they had not complied with the permit requirement. See *id.* at 7a. The City found the sign to be in violation of the Code at that hearing. See *ibid.*; CA Rule 30(b) App. at 117. At that time, petitioners became aware, if they were not before, that their unpermitted sign was unlawful. Petitioners' First Amendment count specifically challenged the application of the permit requirement (along with the distance requirement). See R. 1-1; R. 61 at 11. Thus petitioners were aware of their injury in September 1997 and were required to file suit within two years of that date. Because they waited until January 2000 to bring suit (see R. 1-1), their suit is time barred.

The accrual of petitioners' claim was not delayed until they experienced all the consequences that would eventually flow from the determination that the sign was illegally erected without a permit. To be sure, the City afforded them an opportunity to mitigate the violation by seeking a permit. See Pet. App. 7a. But they could not fairly expect that their sign would be allowed to remain because the 1990 distance requirement, with which the sign admittedly did not comply, had by then been on the books for seven years. So, too, had the grandfather provision, which afforded legal nonconforming status only to signs with permits "lawfully issued prior to the effective date of this section"—in other words issued before 1990. *Id.* at 120a. Petitioners therefore were not entitled to wait to file suit until the City denied their futile request for a permit, nor were they entitled to wait until the City fined them and ordered the sign removed. It is settled that a cause of action accrues when the plaintiff knows or should know that

its rights have been violated, not when the full consequences of that violation are felt. See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (*per curiam*); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). And it is further settled that accrual is not delayed until the plaintiff discovers a legal theory for its injury (see, *e.g.*, *United States v. Kubrick*, 444 U.S. 111, 122-24 (1979)), so petitioners were not entitled to wait until they had fully developed their theory why the application of the permit requirement to the sign violated the First Amendment. This Court should refuse to review a stale First Amendment claim.

3. Even if petitioners' claim is not time barred, none of the questions presented warrants this Court's consideration.

a. Petitioners' first question asserts that the Seventh Circuit's decision conflicts with a Ninth Circuit decision, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007). But resolving the question would require this Court to determine the constitutionality of the former version of the City's permit requirement in the first instance. Moreover, there is no conflict with *Outdoor Media* or this Court's decisions–the Seventh Circuit did not decide the issue that petitioners contend creates the conflict because petitioners presented a different First Amendment theory below. And even if the Seventh Circuit decided what petitioners contend, their claim fails on the merits.

i. In this Court, petitioners assert that the grandfather provision's requirement that signs have a prior permit violates the First Amendment because, they claim, the now-repealed permit requirement in effect when they were required but failed to obtain

one "was facially violative of the First Amendment as a prior restraint of speech" and the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially, his interest in freedom of speech." Pet. 24 (internal quotation marks omitted). Resolution of this question would require that this Court determine in the first instance whether the former version of the permit requirement was actually unconstitutional, a point that we disputed below (see City CA Br. at 31-35), and neither lower court decided. The district court initially rejected the relevance of the argument for several reasons, none of them on the merits, including that it believed the City's former permitting scheme did not implicate First Amendment concerns; the argument merely restated petitioners' procedural due process claim, which was time barred; and petitioners "did not qualify for a permit under the relevant zoning laws and, thus, the delay or discretion in issuing such a permit could not have violated [their] rights." Pet. App. 71a. Later, the court reiterated its view that the permit requirement did not "implicate[ ] First Amendment concerns" (*id.* at 42a), and refused to consider the facial challenge, because it believed that there was not a close enough nexus to expression to pose a threat of censorship (see *id.* at 43a), and that the requirement was "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse" (*id.* at 45a (internal quotation marks omitted)). For its part, the Seventh Circuit "accept[ed] without deciding that the features of the City's permitting scheme on which [petitioners] ha[ve] focused indeed rendered the permit requirement incompatible with the First Amendment, such that [they were] entitled to ignore it." *Id.* at 22a.

This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) (internal quotation marks omitted). That is because the Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). There are no exceptional circumstances justifying departure from this practice in this case. Moreover, petitioners themselves offer little assistance to the Court, outlining their argument that the former version of the permit requirement was unconstitutional only in their statement, not their reasons for granting the petition. Because it would be possible to reach the merits of petitioners' first question only if the Court first resolved the underlying issue favorably to petitioners, this Court should decline review.

ii. The Seventh Circuit's decision does not conflict with *Outdoor Media* or any decisions of this Court because the Seventh Circuit did not hold what petitioners claim. Again, in this Court, petitioners' First Amendment claim challenges the grandfather provision's requirement that signs have a prior permit on the ground that the former version of the permit requirement was "a prior restraint of speech" and the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Pet. 24 (internal quotation marks omitted). In the courts below, however, petitioners' First Amendment claim was very different. There, petitioners claimed it was arbitrary and irrational to grandfather signs that were lawfully established with a permit, but not signs that were lawfully established at a time no permit was required. In other words, the claim then turned on the position that the sign did not need a permit under applicable law, rather than that the sign actually did need a permit, but

petitioners were entitled to ignore the permit requirement because it violated the Constitution.

The evolution of petitioners' claim went as follows. The complaint alleged a First Amendment violation because "the commercial speech contained in the . . . Sign concerns a lawful activity that is not misleading, and which the City has no[ ] legitimate or substantial interest in restricting or prohibiting." R. 61 at 11. In response to the City's motion to dismiss, petitioners described their claim as challenging the Code's provisions that allowed nonconforming advertising signs to remain if they were legally erected pursuant to a permit but not if they were "legally erected or painted without a permit simply because no permit was required by the Code, as in the instant case" and argued that the City "has no legitimate interest under the First Amendment in making such an irrational and arbitrary distinction among non-conforming advertising signs." R. 77 at 7. The district court understood petitioners' argument exactly this way–as a challenge to the Code "as applied to their sign because it allows advertising signs to remain as legal, nonconforming signs if they predated the 1990 amendments and were erected pursuant to a valid permit, but not if the signs predated the 1990 amendments and were erected without a permit, even if no permit was required at the time." Pet. App. 81a-82a.

In the Seventh Circuit, petitioners again described their First Amendment claim as a challenge to the Code's authorization of grandfather status for nonconforming advertising signs that were lawfully erected pursuant to a permit, but not for nonconforming advertising signs, such as their sign, "where the advertising sign was lawfully erected, but where

there had been no prior requirement to obtain a sign permit for its lawful erection." Petrs. CA Br. at 44-45. In fact, they admitted that "the district court [had] correctly observed" that their First Amendment claim challenged the grandfather provision because it allows signs "to remain only if the signs were initially erected pursuant to a permit, regardless of whether such a permit was even required at the time the sign was erected." *Id.* at 45 (internal quotation marks omitted). According to petitioners, it was arbitrary to require a permit to remain when the sign had not needed a permit when erected. See *ibid.* They asserted that the Code's application to the sign failed *Central Hudson*'s test for content-based speech regulations because "the City has no legitimate interest under the First Amendment in making an irrational and arbitrary distinction among nonconforming advertising signs" and there is no "'reasonable fit' between the City of Chicago's restriction against some, but not all, legally erected advertising signs." *Id.* at 47.

Like the district court, the Seventh Circuit understood petitioners' argument exactly as they described it. According to the court, petitioners "contend[ ] that the City has no legitimate interest in grandfathering non-conforming advertising signs that were erected pursuant to a permit but not those, like [their] own, that were erected without one; that distinction, in [petitioners'] view, is irrational and arbitrary." Pet. App. 30a-31a. The court, therefore, addressed the argument presented–that the Code's application to the sign was a regulation of commercial speech that failed *Central Hudson* scrutiny–holding that the regulations were content neutral and that petitioners had waived a challenge under that scrutiny. See *id.* at 31a-32a.

For the first time, petitioners' reply brief altered the presentation of the First Amendment claim to resemble the argument they now make. Petitioners there contended that there was no reasonable fit between the challenged provisions' goals and restrictions because "the City is drawing a distinction between those advertising signs that were erected pursuant to a permit . . . and other advertising signs not erected pursuant to a permit . . . because they were not established with a permit obtained under an unconstitutional sign-permitting scheme." CA Reply Brief at 19-20 (emphasis omitted). The Court of Appeals can be forgiven for overlooking this new version of petitioners' claim, coming as it did in a sentence toward the very end of the section, and especially because petitioners offered no elaboration and did not cite *Outdoor Media* or any of the cases on which they now rely. And even if the Court of Appeals had noticed the shift, it was too little, too late–arguments not raised in the district court, not to mention arguments raised for the first time in a reply brief, are waived in the Seventh Circuit. See, *e.g.*, *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986).

To be sure, petitioners challenged the former version of the permit requirement as an unconstitutional prior restraint in both courts below, but only in the context of their substantive due process claims, not their First Amendment claim. In their post-trial brief, they relied on the supposed unconstitutionality of the permit requirement to justify ignoring that requirement, in an attempt to show their sign was lawful at all times, for purposes of establishing a property interest under Illinois law, a prerequisite to their due process claims. See R. 114 at 27-29. This was years after the court had dismissed their First

Amendment claim. And in the Seventh Circuit, as we explain, they did not link the alleged unconstitutionality of the former permit requirement to their First Amendment challenge until the reply brief, and that effort was half-hearted at best.

Contrary to petitioners' assertion, the Seventh Circuit did not hold that the City may condition "the right to continue [the] sign's display . . . upon prior compliance with [an] unconstitutional requirement without violating the First Amendment" (Pet. 23), nor that compliance with "an unconstitutional law is . . . 'requisite' for securing future speech rights if the government so dictates" (*id.* at 24). The court was never presented with this argument in any meaningful way, and the court's silence regarding the oblique reference in petitioners' reply brief is not equivalent to an express refusal to consider the argument, let alone a holding that it does not violate the First Amendment to condition future speech rights on compliance with an unconstitutional permit requirement. Instead, the court addressed the First Amendment argument petitioners actually made—that the Code's application to the sign was a regulation of commercial speech that failed *Central Hudson* scrutiny. See Pet. App. 30a-32a. It strains reason to read the decision as conflicting with *Outdoor Media* or "carv[ing] out an exception" (Pet. 24), to any of this Court's doctrines by not deciding an issue that was not properly presented. Because the Court of Appeals did not hold what petitioners claim, its decision does not present the conflict petitioners claim.

iii. The conflict with *Outdoor Media* does not exist in any event because it does not hold what petitioners claim, either. The legal issue there was not whether future speech can be conditioned on com-

pliance with an unconstitutional restriction on speech; instead it was whether a permit applicant can bring a First Amendment challenge to an unconstitutional ordinance without ever holding a permit. In that case, a municipality denied a permit to erect billboards under an ordinance it later repealed, and the plaintiff challenged the constitutionality of the prior ordinance on several grounds. See *Outdoor Media*, 506 F.3d at 899. The Ninth Circuit affirmed the dismissal of the procedural due process claim because, without a permit, the plaintiff lacked a vested property right under state law. See *id.* at 902-03. With respect to the First Amendment claim, however, the lack of a permit did not bar a challenge because a vested property right is not required for such claims. See *id.* at 903. On the merits, the court held that the ordinance did not violate the prior restraint doctrine, was not an unconstitutional regulation of commercial speech, but may have impermissibly regulated non-commercial speech. See *id.* at 904-06.

Petitioners imply that the Seventh Circuit's decision conflicts with *Outdoor Media* because of the Ninth Circuit's statement that "'[t]he establishment of a vested property right is irrelevant to [a First Amendment claim].'" Pet. 22 (quoting *Outdoor Media*, 506 F.3d at 903). But the decisions are perfectly consistent on this point. The Ninth Circuit considered the First Amendment claim on its merits even though the plaintiff lacked a vested property right (see 506 F.3d at 903), and the Seventh Circuit did so as well, despite holding that petitioners lacked a vested property right (see Pet. App. 26a-27a, 29a-32a).

Petitioners also assert that the Seventh Circuit's decision conflicts with something "the Ninth Circuit in *Outdoor Media* observed"–that the government

"may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially his interest in freedom of speech." Pet. 23 (internal quotation marks omitted). A conflict with the Ninth Circuit's observations, as opposed to its holdings, is not worthy of this Court's attention. But as important, as we explain above, the Seventh Circuit never held to the contrary. Petitioners did not even cite *Outdoor Media* below, so its observations must not have been particularly relevant to the arguments petitioners were then making. In short, there is no conflict to resolve.

iv. Even if both courts had held what petitioners claim and were in true conflict, petitioners' claim fails on the merits. It depends on the premise that the former permit requirement violated petitioners' constitutional rights and, moreover, that such a violation cannot be the basis for even collateral consequences. In this case, the premise is unfounded. The former version of the permit requirement did not violate petitioners' rights. The constitutional infirmity of the permit requirement, according to petitioners, is that as a prior restraint, it lacked sufficient time limits and guidelines for official discretion and could have been used as a tool to censor speech. But petitioners' speech was never censored. They ignored the permit requirement, and their sign remained up for decades. Without any initial intrusion on petitioners' speech rights, they are ill positioned to claim that the Seventh Circuit "let stand a severe penalty upon the exercise of that First Amendment right." Pet. 21.

Regardless, even where an individual's constitutional rights have been violated, the government does not necessarily violate the Constitution anew by taking the underlying conduct into account. For ex-

ample, in *Lewis v. United States*, 445 U.S. 55 (1980), this Court allowed the use, to criminalize the possession of firearms, of a felony conviction that was unconstitutional under the Sixth Amendment. See *id.* at 66-67. According to the Court, "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66. The Court distinguished several cases, including *Burgett v. Texas*, 389 U.S. 109 (1967), that had refused to allow the use of unconstitutionally-obtained convictions for certain purposes, such as sentence enhancement, that depend on the reliability of the conviction, and made quite clear that "[t]he Court . . . has never suggested that an uncounseled conviction is invalid for all purposes." 445 U.S. at 66-67. Thus, enforcement efforts that violate an individual's constitutional rights can sometimes form the basis for future penalties.

This case aligns with *Lewis* and not *Burgett*. On petitioners' view of the ordinance, the City has granted a benefit–grandfather status for signs that no longer comply with zoning laws–only to those who previously complied with an unconstitutional law and not to those who did not comply. But that distinction does not turn on a determination with suspect reliability, as in *Burgett*. Petitioners readily admit they did not comply with the prior law, although they think they were "'entitled to ignore it.'" Pet. 16-17 (quoting Pet. App. 22a). Just as in *Lewis*, where it was rational for the government to penalize all individuals with felony convictions–even those whose convictions were obtained unconstitutionally–by criminalizing weapons possession, here it is rational for the City to penalize sign owners who did not comply with the permitting requirements, even if unconstitu-

tional, by refusing to grandfather their nonconforming signs.

Nor does the refusal to grandfather petitioners' sign turn on anything they said in the past or propose to say in the future. Tellingly, no one is entitled to the benefit of grandfather status, and it is not granted based on which signs spoke (they all did) or the contents of what the signs said, but whether the signs went through the necessary steps to demonstrate compliance with applicable zoning when erected. This is far different from being denied a job because of the contents of past speech or political association, which makes the concerns identified in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and *Perry v. Sindermann*, 408 U.S. 593 (1972), relied on by petitioners (see Pet. 23-24) irrelevant here. The distinction the City has drawn survives First Amendment review under the scrutiny applicable to content-neutral regulations, and petitioners have waived any argument to the contrary–both by not advancing it in their petition and not arguing it below. This Court should accordingly decline to review petitioners' first question.

b. Petitioners' second question is similarly flawed. It asserts that the Seventh Circuit's decision conflicts with *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), because the First Circuit held that it violates the First Amendment when past lawful speech is used to decide which advertisers can continue to use nonconforming billboards. See Pet. 25.

i. As we explain above, to reach this question, this Court would need to decide in the first instance whether petitioners' past speech was in fact "lawful" because the former version of the permit requirement

was an unconstitutional prior restraint that they were entitled to ignore. This Court should decline to do so.

ii. Moreover, contrary to petitioners' assertion, the Seventh Circuit did not hold that there is no First Amendment violation where a municipality refuses to grandfather a sign because the sign's owner engaged in less favored speech by displaying a sign in violation of an unconstitutional permit requirement. See Pet. 26. Petitioners never presented that argument to the court, as we have explained. If they had, surely they would have cited *Somerville*, decided in 1989, but they did not. Instead, they contended that it violates the First Amendment to distinguish among signs that were equally lawfully established and to favor signs for which permits were required over signs for which permits were not. See Petrs. CA Br. at 44-45. There is consequently no conflict between the decisions to resolve.

iii. Contrary to another assertion, the First Circuit did not "face[ ] the same issue as the Seventh Circuit in the case below." Pet. 25. Instead, the First Circuit examined a grandfather provision that chose which signs to grandfather based on whether the sign, in the year before the ordinance's effective date, had displayed a particular type of commercial message. The court held that a municipality cannot penalize a speaker for the content of his past lawful speech by grandfathering only those nonconforming signs that did not contain that type of commercial message but not those nonconforming signs that did. See *Somerville*, 878 F.2d at 517-18. According to the court, the constitutional flaw with the provision was that "the distinguishing criterion [between signs that are permitted to remain and those that are not] is the content of past lawful speech." *Id.* at 520 (emphasis

added; original emphasis omitted). If the penalty had been based on something that the property owner had done in the past, like stocking tires on its property, rather than on the content of its speech, the court indicated that the regulation could be justified so long as there was a rational basis for the distinction. See *ibid.* And if there had been a content neutral reason for distinguishing among which signs to grandfather, that, too, would justify the distinction. See *id.* at 522.

In this case, the criterion used to determine which signs to grandfather is not the past, present, or future content of the sign but whether the speaker previously obtained a permit–a requirement applicable to all signs, not just commercial ones. Thus, the distinction turns on the speaker's actions, not the speaker's speech. Even assuming that sign owners did not have to comply with the permit requirement if it were unconstitutional, the penalty for noncompliance is not imposed because of content. In contrast, penalizing former speech was the fatal flaw in Somerville's ordinance, and it is impossible to predict what the First Circuit would have held if faced with the issue whether a municipality can penalize a speaker by silencing future speech based on whether the speaker in the past ignored an unconstitutional law (as opposed to engaged in speech with a particular content). Because the distinction between permitted and unpermitted signs is content neutral (not based on anything the signs ever said), and based on something the speakers did rather than said, *Somerville* in fact implies that the regulations here would need only a rational basis to pass constitutional muster. But no matter how the First Circuit would have ruled if faced with a regulation like the

one at issue here, there is simply no conflict between the decisions for this Court to resolve.

iv. As we explain above, petitioners' claim that the First Amendment is violated when future speech is conditioned on past compliance with an unconstitutional permit requirement fails on its merits. Here, the allegedly unconstitutional permit requirement never violated petitioners' First Amendment rights. And it is permissible to impose collateral consequences despite a prior constitutional infirmity in any event. Penalizing petitioners for not complying with the former permit requirement does not punish them based on the content of their past speech, and the grandfather provision passes muster under the scrutiny applicable to content-neutral regulations.

c. Petitioners' third question presents no issue worthy of this Court's review. Petitioners claim a "direct conflict" exists between the way the First Circuit analyzed certain ordinances in *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), and the way the Seventh Circuit analyzed other ordinances here. Pet. 27. In *Cambridge*, according to petitioners, the court examined a local zoning ordinance in combination with a state grandfather provision, whereas in this case, petitioners claim that the Seventh Circuit did not examine "the combined effect" of the distance requirement, the grandfather provision, and the former permit requirement. *Id.* at 27-28. They further decry that the First Circuit found the regulations it examined unconstitutional, but the Seventh Circuit did not. See *id.* at 28-29.

i. There is no conflict between the "approaches" (Pet. 29) used by the two courts in deciding which regulations to analyze. Both courts followed

the same approach–they examined "the combined effect" (*id.* at 27) of their respective ordinances and reached different results because the ordinances are different. In *Cambridge*, the municipality passed a zoning ordinance prohibiting signs based on certain content-neutral criteria such as height, size, and location. See 88 F.3d at 34. A state statute, however, afforded grandfather status only to certain signs and distinguished among them based on their past content–only those nonconforming signs that had contained onsite messages (messages about subjects related to the property on which the sign was located) received grandfather protection. See *ibid.* The paradoxical result was that signs containing noncommercial speech were denied grandfather status if the message pertained to something off the property, whereas signs containing commercial speech relating to the property were protected. See *ibid.* For purposes of its analysis, the court "treat[ed] the state grandfathering provision as part-and-parcel of the Cambridge ordinance" (*id.* at 35 n.6) and found that the scheme violated the First Amendment because it disadvantaged certain noncommercial speech and penalized certain speakers for the content of their past speech (see *id.* at 37-39).

In this case, the Seventh Circuit, like the First Circuit, analyzed all of the challenged provisions with which it was presented. It simply determined that the combined effect of the regulations at issue was content neutral. See Pet. App. 31a-32a. The court acknowledged petitioners' argument that the distance requirement is a regulation of commercial speech and applicable to their sign. See *id.* at 31a. But because petitioners had directed their challenge to the City's refusal to grandfather signs, like theirs, that lacked prior permits, while grandfathering signs

that had them, the court also examined the impact of those provisions on petitioners' sign. See *ibid.* It concluded that because the determination which signs to grandfather was not based on the content of the sign, but on whether the sign had a permit, and because the permit requirement was applicable to all signs, the combined effect of this scheme was content neutral. See *id.* at 31a-32a. Petitioners disagree with this conclusion (see Pet. 29), but that does not render the approach used by the Seventh Circuit in conflict with the First Circuit's approach. Both courts looked at all the regulations at issue.

ii. Even if there were a difference in the two courts' "approaches," the manner in which courts choose to interpret different local ordinances is not an important issue warranting this Court's attention, especially where the regulations at issue are not similar. That one Court of Appeals looked at a local ordinance in combination with a state statute, whereas another focused on only the ordinances having the most significance to the question before it presents no controversy of nationwide significance. And resolving this question would of course require this Court to delve into the minutia of local ordinances to determine which court properly identified the scheme to analyze, all in the service of tutoring the courts below on general methods of statutory analysis. This Court no doubt has better uses for its time.

iii. That the courts reached different conclusions concerning the schemes at issue also should not trouble this Court because of the differences between the regulations. Contrary to petitioners' assertion (see Pet. 28), the First Circuit did not determine whether the scheme it examined was content based or content neutral, instead "choos[ing] to sidestep

that difficult question" (88 F.3d at 37) because the regulations at issue distinguished among categories of noncommercial speech (the most favored type) and penalized speakers based on the content of their past speech (see *id.* at 37-39). The City's ordinances are not similarly flawed. They do not penalize noncommercial speech (in fact petitioners' sign even today could display a noncommercial message) and do not determine grandfather status based on what the sign said in the past, but instead based on whether the sign met the universally applicable permit requirement. And the scheme at issue in *Cambridge* involved a content-neutral zoning change (prohibiting signs based on size, height, etc.), but a content-based approach to determining which signs to grandfather. In contrast, the City's scheme involves a prohibition of advertising signs, but a content-neutral method of determining which signs to grandfather. When examining regulations so different, the courts understandably reach different results, and do not conflict if they do. This Court should reject petitioners' request to correct the errors they perceive with the decision below, and, as we have explained, this case was correctly decided in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant
Corporation Counsel
KERRIE MALONEY LAYTIN *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0764

* Counsel of Record

Attorneys for Respondent
City of Chicago

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